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No: ICC-01/14-01/18

Date: 25 June 2024

TRIAL CHAMBER V

Before:

Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA*

Confidential
URGENT

Defence Request to strike out the Annex to the “Prosecution Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(6)(30” (ICC-01/14-01/18-2543), or in the alternative, Request for an extension of time to respond to ICC-01/14-01/18-2543

Source: Defence of Patrice-Edouard Ngaïssona

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor Mr Karim A.A. Khan KC Mr Mame Mandiaye Niang Mr Kweku Vanderpuye	Counsel for the Defence of Mr Ngaïssona Mr Geert-Jan Alexander Knoop Ms Marie-Hélène Proulx Ms Lauriane Vandeler Ms Antonina Dyk Ms Sara Pedroso
	Counsel for the Defence of Mr Yekatom Ms Mylène Dimitri Mr Thomas Hannis Ms Anta Guissé Ms Sarah Bafadhel
Legal Representatives of the Victims Mr Yaré Fall Ms Marie Edith Douzima Lawson Ms Paolina Massidda Mr Abdou Dangabo Moussa Ms Elisabeth Rabesandratana Mr Dmytro Suprun	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States' Representatives	Amicus Curiae

REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

I. INTRODUCTION

1. On 21 June 2024, the Prosecution filed the "Prosecution's Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(3)" ('Request')¹. It annexed to the Request a 98-page document that it would have wished to present to Witness D30-4885 had the Defence not withdrawn him as a witness.² This annex consists of 29 pages of certain excerpts of raw Facebook data and the Prosecution's description of it. More importantly, it includes no less than 68 pages of factual conclusions that the Prosecution has drawn from the evidence presented in this case ('Annex').
2. In filing the Annex, the Prosecution has completely disregarded Regulation 36(2) of the Regulations of the Court ('the Regulations') that categorically prohibits participants from submitting annexes that contain submissions. Accordingly, the Defence requests that Trial Chamber V ('the Chamber') strike from the record the Annex, whose "Analysis" section amounts to closing submissions seeking to show how the Prosecution has discharged its burden of proof regarding the key factual issues that the Chamber will decide at the end of this case.
3. In the extraordinary event the Chamber were to allow the Prosecution to completely circumvent the law by not striking the Annex from the record, the Defence requests an extension of time pursuant to Regulation 35(2) of the Regulations to respond to the Request, which will include a response to the Annex. The Defence submits there is good cause to grant an extension of 21 days to respond to the Request, as substantiated below. Additionally, the Defence requests that the Prosecution not be allowed to refer to the Annex in either its closing brief or its closing statements.

¹ ICC-01/14-01/18-2543-Conf

² ICC-01/14-01/18-2543-Conf-Anx; ICC-01/14-01/18-2543-Conf, para. 8.

4. The Defence files the present request urgently since the ten-day deadline to respond to the Request has started to run, and D30-4679's and D30-4848's testimonies related to *inter alia* Facebook evidence are imminent.

II. CONFIDENTIALITY

5. In accordance with Regulation 23*bis*(1) of the Regulations, the present Request is filed as "confidential" as it contains information related to filings that have the same classification. However, the Defence would not oppose a reclassification to public once public redacted versions of the relevant filings have been made.³

III. SUBMISSIONS

A. The Annex to the Request must be stricken from the record

6. Regulation 36(2) is clear with respect to the information that may be contained in an appendix to a submission filed before the International Criminal Court ('Court'). It states that while appendixes shall not be counted in the calculation of page limits, an appendix "*shall not* contain submissions", and that it should consist of non-argumentative material (*emphasis added*). The Annex should be stricken from the record for the following three reasons. First, it completely disregards the limits imposed by Regulation 36(2) of the Regulations in that it consists mainly of extensive submissions. Second, the Annex is nothing more than a veiled attempt of the Prosecution to circumvent the page limit on the closing briefs imposed by the Chamber. Third, it also masks the Prosecution's true intent to influence the Chamber in its assessment of evidence on the eve of hearing the evidence of D30-4848 and D30-4679 who are both scheduled to testify on *inter alia* Facebook material from 4 to 8 July and 12 to 18 July 2024, respectively.

³ ICC-01/14-01/18-2543; ICC-01/14-01/18-2410-Conf.

7. The "Analysis" section of the Annex beginning on page 29 provides the Prosecution's final assessment of key factual issues in this case, many which relate to Mr Ngaïssona's individual criminal responsibility. These assessments read like the submissions the Chamber will likely find in the Prosecution's closing brief. Some salient examples of the Prosecution's assessment of the evidence contained in the Annex include:

- that Mr Ngaïssona and other members of the inner circle would meet in Yaoundé and Douala, and that they planned to execute a military response.⁴
- that Mr Ngaïssona would have participated in the organization of actual military operations from July 2013 onwards.⁵
- that Mr Ngaïssona participated in the implementation of FROCCA's military plans.⁶
- that the attacks on Bangui and Bossangoa of 5 December 2013 were coordinated.⁷
- that Mr Ngaïssona was "fully aware" of the movements on the ground and that he was in direct contact with BOZIZÉ.⁸
- that Mr Ngaïssona and the so-called inner circle were "fully aware" of the Anti-Muslim animus of the Anti-Balaka.⁹

⁴ Annex, page 31, para. 10.

⁵ Annex, pages 35-37.

⁶ Annex, pages 39-40.

⁷ Annex, para. 72.

⁸ Annex, para. 37.

⁹ Annex, pages 88-97.

8. Since the information in the Annex amounts to submissions, the Prosecution has violated Regulation 36(2) of the Regulations. The Appeals Chamber has ruled that filing submissions in the form of annexes is an unacceptable practice and has disregarded such submissions when they were filed.¹⁰ The Defence requests that the Chamber do the same by striking the Annex from the record.
9. In addition to violating Regulation 36(2), the Prosecution appears to be using the Annex as a veiled attempt to circumvent the Chamber's Decision on the page limits for the closing briefs.¹¹ The Chamber previously rejected the Prosecution's request for an extension of page limit of 375 pages for its closing brief.¹² Given that the Annex contains extensive submissions related to the factual findings that the Chamber will have to make at the conclusion of this case, the Defence is not speculating when making such an argument. The Prosecution is supplementing the future 250 pages it will file, with this single spaced 70-page argumentative Annex.¹³
10. Moreover, while the Prosecution claims that it intended to present this document to Witness D30-4885, the Defence is puzzled by these submissions since the date of the Annex is 21 June 2024; the Prosecution interviewed D30-4885 on 29 January 2024 and D30-4885 was originally scheduled to testify in March 2024. It is therefore unconvincing that the Annex, which the Defence was only made aware of yesterday, truly reflects the document the Prosecution wished to present to

¹⁰ Situation in the Republic of Kenya, Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga, ICC-01/09-96-Red OA2, 11 July 2012, para. 5; Prosecutor v. Bemba et al., Appeals Judgment, ICC-01/05-01/13-2275-Red, 8 March 2018, para. 778.

¹¹ ICC-01/14-01/18-2417. The Chamber granted to all the parties an extension of page limit to file its closing brief, up to 250 pages.

¹² Ibid.

¹³ The first 29 pages of the Annex appear to be the same or very similar to the Prosecution's Annex B to the "Prosecution's Seventeenth Application for Submission of Facebook Evidence from the Bar Table" (ICC-01/14-01/18-2602-Conf together with confidential Annexes A and B), which the Defence had strongly opposed as it amounted to a circumvention of the Chamber's ruling dismissing its request for leave to reply to the Defence response to the seventh Prosecution submission request from the Bar Table, ICC-01/14-01/18-2115-Conf, paras 6-8.

D30-4885 in advance of his testimony, a request that would have in any event been strongly opposed by the Defence for reasons below.

11. The "Analysis" section of the annex is wholly irrelevant to Witness D30-4885's prospective testimony further adding doubts as to the Prosecution's intentions with respect to the Annex. Indeed, the only connection between the "Analysis" Section and D30-4885's prospective testimony is that they both reference Facebook conversations.¹⁴ The connection stops there. It is remarkable that a significant portion of the Annex does not even reference Facebook conversations, but rather, CDRs and other types of evidence (such as witness testimony and prior recorded statements)¹⁵ which the Prosecution has had the opportunity to submit and litigate at length.¹⁶ It is inappropriate for the Prosecution to furtively attempt to supplement its prior submissions on disputed evidence by means of the Request.

12. Witness D30-4885 was never intended to be called to give his opinion on the factual conclusions the Prosecution drew from Facebook evidence, which is outside D30-4885's competence. Indeed, the Chamber decided to introduce Witness D30-4885's prior recorded testimony pursuant to Rule 68(3) because of the specific technical answers D30-4885 was expected to provide regarding Facebook's operating methods.¹⁷ The factual conclusions that the Prosecution draws from Facebook conversations has no bearing on Facebook's operating methods.

¹⁴ However, it must be noted that the Prosecution not only refers to Facebook evidence to support the allegations it makes in the Annex. It also includes references to other evidence on record including news articles, CDR's, emails, and witness testimony.

¹⁵ See for instance Annex, pages 21, 35, 42 47, 50, 52-54, 71, 87 which reference P-2673's testimony and prior recorded statement.

¹⁶ See for instance sub-section "f. CDRs confirm the coordinated execution of the 5 December 2013 BANGUI and BOSSANGO attacks", Annex, pages 79-82, which relies entirely on CDR evidence, and not Facebook evidence.

¹⁷ ICC-01/14-01/18-2410-Conf, paras. 12-13

13. Further, providing Witness D30-4885 with the Prosecution's assessment of the Facebook evidence would have improperly influenced D30-4885 to such an extent that the probative value of his testimony would have been diminished. Given the lack of relevance of the Annex, its potential prejudice, and the avenue it has created for the Prosecution to make closing submissions, the Defence submits that it should be stricken from the record.
14. Additionally, the Defence is further prejudiced by the Annex, in that Prosecution buttresses many of its factual conclusions by referring extensively to evidence relating to D30-4679 and D30-4848 who are scheduled to begin testifying in the next two weeks.¹⁸ The timing of Annex whose content is wholly irrelevant to Witness D30-4885's prospective testimony falls very closely to D30-4679 and D30-4848's imminent appearance. It gives reason to believe that the Annex was filed to influence the Chamber's assessment of D30-4679's and D30-4848's prospective evidence.
15. The Prosecution has deliberately contravened the Regulations for the sole purpose of putting before the Chamber its final submissions on the case, and to influence the Chamber's assessment of D30-4679's and D30-4885's evidence. Were the Chamber to consider the Annex, it would do so in violation of its duty to ensure the fair and expeditious conduct of the proceedings for the following three reasons.
16. *First*, the Annex is completely irrelevant to deciding the issue at hand, namely whether D30-4885 should be called as a Chamber witness since: (1) he was never shown the Annex and (2) the majority of its content is unrelated to D30-4885's technical expertise as the Defence has substantiated above.

¹⁸ D30-4679's name is referenced 91 times in the Annex whereas D30-4848's name is referenced 14 times in the Annex.

17. *Second*, if the Chamber were to consider the Annex, the Defence would be required to respond to it despite its irrelevance, given that it contains the Prosecution's final conclusions on its assessment of the evidence and it potentially prejudices D30-4885's ability to provide evidence impartially. This will require time and resources of the Defence to the detriment of it closing its case, which it aims to do without undue delay.

18. *Third*, the Prosecution would suffer no prejudice were the Chamber to strike the Annex from the record. The Chamber has provided the Prosecution with ample opportunities to make such submissions in the near future by both allowing it to file a closing brief and make closing arguments.

B. In the alternative, were the Chamber to consider the Annex to the Request, the Defence requests an extension of time pursuant to Regulation 35(2)

19. If the Chamber were to strike from the record the Annex, the Defence would be able to respond within the time limit to the Prosecution's request to add D30-4885 as a Chamber witness.¹⁹ However, in the extraordinary event the Chamber were to consider the Annex, the Defence requests the following: (1) that it be granted a 21-day extension of time such that it can file a response to the Request on 26 July 2024, and (2) that the Chamber prohibit the Prosecution from referencing the Annex in its closing brief.

20. There is good cause justifying the granting of the reasonable extension of time for the following three reasons. *First*, the Defence's limited resources are fully engaged in preparing for the substantive examinations and logistical arrangements of its three remaining witnesses who are due to testify as of next week. Witness D30-

¹⁹ This is however dependent on the timely provision of the materials provided by D30-4885 in the *Abd-Al-Rahman* case.

4848 is due to start testifying on Thursday, 4 July, whereas the deadline to respond to the Request falls on Friday, 5 July. Additionally, the Defence is finalizing its review of the case record so it can close its case in a timely manner. This involves constant revisions of the materials that it will seek to submit into evidence, in addition to making final conclusions to be drawn from the evidence.

21. The Request, and particularly the Annex, through which the Prosecution seeks to indirectly supplement its case by contravening the applicable Regulations and Chamber decisions, is entirely unforeseen. Throughout trial, the Prosecution made a strategic choice to not call an expert witness with respect to the Facebook conversations. The timing of the Request, namely a few weeks before the last Defence witness is scheduled to testify, is consequential.
22. *Second*, as stated above, the inopportune timing of the Prosecution's Request is compounded by its filing of the Annex containing Prosecution's analysis and conclusions with respect to the Facebook evidence and other evidence on record. In order to respond to the Request, the Defence requires additional time to carefully review the Annex and the hundreds of external references to various documents therein (including documents which do not form part of the case record),²⁰ including CDR, emails, witness testimony, and other miscellaneous documents. It is a dense and complex document encompassing virtually the entirety of the Prosecution's case theory, including Mr Ngaïssona's requête *mens rea* as substantiated above.
23. *Third*, in its Request, the Prosecution refers to the testimony of D30-4885 in the case of *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* to argue that D30-4885 "assisted" Trial Chamber I on "similar matters". The transcript of D30-4885's testimony in the *Abd-Al-Rahman* case exceeds 100 pages. In addition, the Defence

²⁰ For example document CAR-OTP-00000637 is referenced six times in the Annex, despite not being formally submitted.

does not have access to D30-4885's expert report and materials provided to the witness in that case, which are necessary to cogently respond to the Request, further adding to the Defence's workload. The Defence will file a disclosure request in this respect as soon as possible, which may entail a further and unexpected delay.

24. As shown above, the Defence has demonstrated good cause pursuant to Regulation 35(2) of the Regulations for a limited extension of time that will not have an impact on the expeditiousness of the proceedings. The Defence is asking for a 21-day extension that will not impede the Defence's examination of its final three witnesses, and the filing of its last bar table motions.

25. Additionally, the Defence requests, if the Chamber does not strike the Annex from the record, that the Prosecution be ordered to not refer to it in either its closing brief or closing statements. Such a ruling is necessary to ensure that the Prosecution does not circumvent the Chamber's ruling on the 250-page limit for the closing brief.

IV. RELIEF SOUGHT

26. For the reasons presented above, the Defence respectfully requests the Chamber to :

- STRIKE from the record the Annex to the Request.

In the alternative, the Defence requests the Chamber to:

- GRANT its request for an extension of time until 26 July 2024 to respond to the Request including the Annex;
- ORDER the Prosecution to not reference the Annex in either its closing brief or closing statements.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character, followed by a horizontal line.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 25 June 2024

At The Hague, the Netherlands.